Northern Montana Health Care Center, a subsidiary of Northern Montana Health Care, Inc. *and* United Food and Commercial Workers Union, Local No. 8. Case 27–CA–13394

October 17, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On September 20, 1995, Administrative Law Judge Clifford H. Anderson issued the attached decision. The Respondent, the General Counsel, and the Charging Party filed exceptions and supporting briefs, and the Respondent filed an answering brief.[1]

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified below and to adopt the recommended Order as modified and set forth in full below.[2]

1. We adopt the judge's findings that the Respondent, Northern Montana Health Care Center (Care Center), is the legal successor to the predecessor employer, Lutheran Home of the Good Shepherd (the Home), some of whose employees were represented by the Charging Party Union until the Home's sale to the Care Center on August 31, 1994; that the Care Center, Northern Montana Hospital (the Hospital), and their parent corporation, Respondent Northern Montana Health Care, Inc. (the Corporation) constitute a single employer (the Respondent);[3] that in early September 1994, the Care Center employed a representative complement of employees, a substantial majority of whom were formerly employed in the predecessor's unit; and that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with the Union.[4] We also agree with the judge's finding that the dietary aides, maintenance workers, laundry workers, and housekeepers who regularly work at the Care Center are properly included in the appropriate bargaining unit.[5]

2. We do not agree, however, with the judge's finding that the licensed practical nurses (LPNs) formerly included in the predecessor employer's certified unit and currently employed at the Care Center are supervisors within the meaning of Section 2(11) of the Act. Accordingly, we reverse the judge's finding that the LPNs are not to be included in the appropriate bargaining unit.

It is well established that the burden of proving supervisory status is upon the party asserting it.[6] Thus, the burden was on the Respondent to establish the supervisory status of the LPNs. We find that the Respondent failed to meet that burden.

Section 2(11) of the National Labor Relations Act defines a supervisor as:

> . . . any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The Care Center employs five LPNs, four of whom previously held the same position at the Home. The LPNs regularly serve as medication nurses and charge nurses in both of the Care Center's wings. The judge

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996). In addition, the judge recommended that the Board issue a broad order requiring the Respondent to cease and desist from violating the Act ''in any other manner.'' We, however, do not find the Respondent's conduct in this case egregious enough to warrant the issuance of such an order. Accordingly, we are issuing a narrow cease-and-desist order requiring the Respondent to cease and desist from violating the Act ''in any like or related manner.'' See *Hickmott Foods*, 242 NLRB 1357 (1979). Finally, the judge incorrectly used the formula in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), for computation of amounts necessary to make employees whole for any losses they suffered as a result of the Respondent's unilateral changes in employee terms and conditions of employment. The proper formula for such computation in the current situation appears in *Ogle Protection Service*, 182 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971).

[3] In addition to the reasons articulated by the judge for finding that the single-employer status of all three of the above-named entities was adequately pled, we also find that the issue was fully litigated. See *Britt Metal Processing*, 322 NLRB 421 (1996).

[4] The judge found that the Respondent's bargaining obligation began to run on September 16, 1994, ''a time when there was no dispute that Respondent was fully apprised of the Union's successorship theory.'' The General Counsel and the Charging Party Union have excepted to this finding, and we find merit in their exceptions. As the judge acknowledged, a union's request that a successor employer bargain with it need not set forth the union's theory of the successor's obligation to bargain. *Al Landers Dump Truck*, 192 NLRB 207, 208 (1971), enfd. sub nom. *NLRB v. Cofer*, 637 F.2d 1309 (9th Cir. 1981). Contrary to the judge, we find that the Respondent's bargaining obligation attached on September 6, 1994, when the Respondent received the Union's letter demanding bargaining.

[5] On September 14, 1994, the Respondent filed an RM petition which sought a bargaining unit that was much smaller than the predecessor employer's established unit. The judge erroneously stated that the Regional Director for Region 27 had dismissed that RM petition. In fact, that petition has not been dismissed, but rather has been administratively ''blocked'' by the issuance of the instant unfair labor practice complaint. The judge's misstatement does not affect the result herein.

[6] *Chevron U.S.A., Inc.*, 309 NLRB 59, 62 (1992), enfd. mem. 28 F.3d 107 (9th Cir. 1994); *George C. Foss Co. v. NLRB*, 752 F.2d 1407, 1410 (9th Cir. 1985); and *Tucson Gas & Electric Co.*, 241 NLRB 181, 181 (1979).

found that when working in their charge nurse capacity, the LPNs are responsible for residents and staff in the wing to which they have been assigned.[7]

The judge, without noting his reliance on any specific evidence, found that ''[LPNs] when acting as charge nurses give direction to [nurses aides] which is not of a routine or clerical nature and involves the use of independent judgment.'' ''On that basis alone,'' the judge stated, he found the LPNs to be supervisors within the meaning of Section 2(11) of the Act.[8] Although the Respondent asserted and the judge listed other supervisory authority which the Respondent's LPNs allegedly possess, such as assigning work to nurses aides, issuing oral or written discipline, and assigning overtime,[9] the judge relied *solely* on responsible direction to support his supervisory finding.

The Board's analysis of responsible direction following the Supreme Court's *Health Care & Retirement* decision is fully set forth in *Providence Hospital*, 320 NLRB 717, 727–730 (1996), which issued after the judge's decision in the instant case. This analysis was endorsed by the United States Court of Appeals for the Ninth Circuit, 121 F.3d 548 (9th Cir. 1997), enfg. *Providence Alaska Medical Center*, 321 NLRB No. 100 (July 10, 1996) (not reported in Board volumes). As explained in *Providence Hospital*, supra, the Board applies to charge nurses the same test it applies to all other employees. In determining whether the charge nurses' directions render them statutory supervisors, the Board decides whether the directions given require independent judgment or whether such directions are merely routine.

Here, the evidence does not establish that the LPNs use their independent judgment to responsibly direct the work of aides in a manner that is neither routine nor clerical. Thus, when serving as charge nurses, the evidence establishes that the only ''direction'' in which LPNs engage is directing nurses aides in certain routine aspects of patient care, such as taking residents' vital signs, taking residents for short walks, assisting residents to the dining room, and helping them eat. These tasks, however, are routine ones that are done day-after-day, and there is no evidence that in directing the nurses aides to do them (and to do them correctly), the LPN charge nurses are exercising any independent judgment. In fact, according to the uncontradicted testimony of LPN Sandra Newberry, if an LPN sees a nurses aide performing a task incorrectly, the LPN will simply demonstrate to the aide the correct way to perform the task. This is nothing more than the exercise of the LPN's greater skill and experience in helping a less skilled employee perform her job correctly. As the Board stated in *Providence Hospital*, supra, 320 NLRB at 729, ''Section 2(11) supervisory authority does not include the authority of an employee to direct another to perform discrete tasks stemming from the directing employee's experience, skills, training, or position . . . .''

There is no probative evidence that the Respondent's LPNs are authorized to hire,[10] suspend, lay off, recall, promote,[11] or reward nurses aides[12] or any other employees, or to effectively recommend such actions. The Respondent, however, contends that the LPN charge nurses do have authority to transfer and discharge nurses aides, or to effectively recommend such

[7] This finding is undercut by the testimony of Respondent's witness, director of nursing, Leann O'Reilly, who testified that since the Care Center opened there has never been a LPN present without a registered nurse (RN) also on duty. She further testified that when an LPN is serving as a charge nurse, there is always an RN at the facility in another unit plus three management RNs in the building upon which the LPN can always call. Finally, O'Reilly testified that if an LPN was charge nurse in one wing, an RN would always be in charge in the other wing and *the LPN takes direction from the RN*. (Emphasis added.)

[8] The judge added that in *NLRB v. Health Care & Retirement Corp*., 511 U.S. 571 (1994), the Supreme Court found similar charge nurse direction to aides to be evidence of supervisory status. We disagree. As the General Counsel points out in his brief, the Court's decision was a very narrow one limited to rejecting the Board's ''patient care'' analysis for determining the supervisory status of nurses. The Court specifically stated that the case before it did not present the question whether ''these nurses were supervisors under the proper test.'' Id. at 584.

[9] The only evidence regarding LPNs' assignment of overtime to nurses aides shows that if a shift is understaffed, an LPN charge nurse can assign overtime or call in an employee to assure an adequate employee complement. The Respondent, however, failed to demonstrate that the LPNs exercise independent judgment in determining whether additional staff is needed in particular situations. Further, the evidence shows that there is a list of nurses aides who have volunteered to receive overtime assignments. The charge nurse goes down that list to call on nurses aides. A nurses aide, upon being called, can decline the assignment.

[10] While the Care Center's LPN job description lists participation in hiring and firing decisions as part of the LPNs' responsibilities, no evidence was introduced to establish that LPNs were ever authorized to engage in such functions. Moreover, the job description discussed herein was not approved by the Care Center until January 1995, some 5 months after the Care Center hired these LPNs and became the successor to the Home. See *Chevron U.S.A., Inc*., 309 NLRB 59, 62 (1992), enfd. mem. 28 F.3d 107 (9th Cir. 1994).

[11] The Respondent asserts that the LPN charge nurses herein evaluate the nurses aides. The evidence presented by the Respondent, however, establishes only that the LPN charge nurses have, through use of a form, evaluated nurses aides on how well they wash their hands. This limited ''evaluation'' function, however, does not require the exercise of independent judgment on the part of the LPN charge nurses, but rather, involves only the exercise of routine or clerical functions. Moreover, at the time of the hearing, April 1995, no annual evaluations had been given and Respondent, at best, testified only that it ''anticipated'' LPN charge nurse ''participation'' in annual evaluations sometime in the future, but did not indicate the anticipated extent of that participation.

[12] The Respondent asserts that LPN charge nurses can recommend nurses aides for awards. The evidence, however, establishes that any employee can recommend any other employee for an award, and the Respondent introduced no evidence to establish that charge nurse recommendations were given any more weight than any other employee's recommendation in determining whether nurses aides received awards.

actions, as well as the authority to adjust their grievances. We find, however, that the evidence does not support these contentions.

First, the Respondent presented scant evidence that LPN charge nurses had the authority to transfer or discharge nurses aides, or to effectively recommend such actions. The only evidence the Respondent presented concerning an LPN charge nurse's authority to transfer an aide was the testimony of Director of Nursing O'Reilly that if one of the wings was short staffed, an LPN charge nurse could transfer an employee to the wing. The Respondent presented no examples of such transfers, nor did it provide any evidence to indicate that such transfers involved anything more than a routine judgment as to the number of aides needed to serve a particular number of patients.

Next, the Respondent presented the testimony of LPN Sandra Bennett and Assistant Director of Nursing Alice Chambers to establish that LPN charge nurses had the authority to effectively recommend the discharge of nurses aides. Bennett summarily testified that she has authority to recommend the termination of an employee, but neither she nor any other witness provided examples of any instance where any such recommendation had been made which had resulted in the discharge of an employee. Chambers testified that she relied upon LPN evaluations in deciding whether to terminate probationary nurses aides. However, at the time of her testimony, no LPN had written an annual evaluation of an employee and Chambers merely ''anticipated'' that when annual evaluations were performed, LPN charge nurses would ''participate'' in such reviews. Her testimony, however, included no examples of any discharge based on an LPN's evaluation. Accordingly, we find that this scant evidence is insufficient to establish that LPN charge nurses exercise supervisory authority in the transfer or discharge of any employee.

The Respondent's assertion that LPN charge nurses have the authority to adjust grievances is belied by the testimony of its own witness, Director of Nursing O'Reilly. Thus, while O'Reilly testified that LPN charge nurses were authorized to handle grievances and disputes between employees, she further testified that LPN charge nurses are instructed to come to her with conflicts, discuss the problem with her and go back to the unit and try to resolve them. ''If that doesn't work,'' O'Reilly testified, ''[S]he can come back to me and we will take it from there.'' Moreover, LPN Newberry testified that when a nurses aide comes to her with a problem, she speaks to O'Reilly and if O'Reilly feels Newberry can handle the problem, O'Reilly will tell Newberry to deal with it and then to report back to O'Reilly and tell her the outcome. We find that the evidence does not establish that LPN charge nurses have the authority to independently adjust employee grievances.

As mentioned above, the judge referred generally to the Respondent's contention that the LPNs have supervisory authority to assign work to nurses aides. While it is true that LPN charge nurses write the names of nurses aides on assignment sheets, the record shows that aides can switch assignments among themselves without first checking with an LPN as long as all assignments remain covered. Thus, the act of the LPN in writing a particular aide's name on the assignment sheet is of no particular consequence in determining which aide actually ends up doing the work.

The judge also noted the Respondent's assertion that the LPNs have the authority to issue oral or written discipline. The only evidence of such alleged authority is a document introduced by the Respondent which shows that LPN Barbara Grabert wrote a record of an oral warning to nurses aide Michelle Anderson. However, the recordation of the oral warning was written on the predecessor employer Home's letterhead, not the Care Center's, and there is no evidence that the warning affected Anderson's job status or resulted in any adverse personnal action. See *Northcrest Nursing Home*, 313 NLRB 491, 497 (1993).

Having found that LPN charge nurses do not exercise independent judgment with regard to any of the indicia of supervisory authority set forth in Section 2(11) of the Act, we find that they are not supervisors. Accordingly, we reverse the judge's finding that the LPN charge nurses are supervisors and conclude that they are to be included as part of the appropriate unit concerning whom the Respondent must bargain with the Union.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Northern Montana Health Care, Inc., and its subsidiaries Northern Montana Hospital and Northern Montana Health Care Center, Havre, Montana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with the Union respecting the unit set forth below.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding

is reached, embody the understanding in a signed agreement:

> Employees of Northern Montana Health Care, Inc., Northern Montana Hospital, and Northern Montana Health Care Center regularly employed at the Northern Montana Health Care Center in the following job classifications: licensed practical nurses, nurses aides, dietary aides, rehabilitation aides, maintenance employees, laundry employees, housekeepers, activity aides and ward clerks, excluding all professional employees, registered nurses, administrators, activity supervisors, confidential employees, guards and supervisors as defined in the Act and all employees irregularly employed at the Care Center.

(b) On request of the Union, restore the status quo ante of unit employees, rescinding any changes made in the unit employees' wages, hours, and working conditions that were implemented on or after September 6, 1994, and make all affected unit employees whole for any and all losses they incurred by virtue of the changes to their wages, fringe benefits, and other terms and conditions of employment from September 6, 1994, until it negotiates in good faith with the Union to agreement or to impasse, the amount owing to be computed as described in *Ogle Protection Service*, 182 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as calculated in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze and determine the amount of money owed to these unit employees.

(d) Within 14 days after service by the Region, post at the following of its facilities in Havre, Montana, copies of the attached notice marked ''Appendix'':[13] Northern Montana Health Center, Inc., Northern Montana Hospital, and Northern Montana Health Care Center. Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 6, 1994.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to recognize and bargain with United Food and Commercial Workers Union, Local No. 8 as the exclusive collective-bargaining representative of employees in the following appropriate unit:

> Employees of Northern Montana Health Care, Inc., Northern Montana Hospital, and Northern Montana Health Care Center regularly employed at the Northern Montana Health Care Center in the following job classifications: licensed practical nurses, nurses aides, dietary aides, rehabilitation aides, maintenance employees, laundry employees, housekeepers, activity aides, and ward clerks, excluding all professional employees, registered nurses, administrators, activity supervisors, confidential employees, guards and supervisors as defined in the Act, and all employees irregularly employed at the Care Center.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, recognize and bargain with the Union as the exclusive collective-bargaining representative of our employees in the appropriate unit set forth above concerning wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL, on request of the Union, restore the status quo ante of unit employees, rescinding any changes made in the unit employees' wages, hours, and working conditions that were implemented on or after September 6, 1994, and make all affected unit employees whole for any losses they incurred by virtue of the changes in their wages, benefits, and other terms and

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

conditions of employment from September 6, 1994, until we negotiate in good faith with the Union to agreement or to impasse, with interest.

NORTHERN MONTANA HEALTH CARE, INC., AND ITS SUBSIDIARIES NORTHERN MONTANA HOSPITAL AND NORTHERN MONTANA HEALTH CARE CENTER

A. E. Rubble, Esq., for the General Counsel.
Donald C. Robinson, Esq. (Poore, Roth & Robinson), of Butte, Montana, for the Respondent.
D. Patrick McKittrick, Esq., of Great Falls, Montana, for the Charging Party.

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. I heard this matter in trial in Havre, Montana, on April 26, 27, and 28, 1995, pursuant to a complaint and notice of hearing issued by the Regional Director for Region 27 (the Regional Director) of the National Labor Relations Board (the Board) based on a charge filed by United Food and Commercial Workers Union, Local No. 8 (the Union) against Northern Montana Health Center (the Center) on September 16, 1994, and docketed as Case 27–CA–13394. The Regional Director issued an amended complaint and notice of hearing on January 13, 1995, against the Center and a second amended complaint and notice of hearing on March 31, 1995, against the Center and Northern Montana Health Care, Inc. (sometimes the Parent Corporation) as a single employer with the Center (sometimes collectively, the Parent Corporation as Respondent). Respondent filed timely answers to the complaints.

The complaint alleges that Respondent purchased the business of the Lutheran Home of the Good Shepherd in August 1994 and thereafter operated the business in basically unchanged form employing as a majority of its employees the employees of the Lutheran Home of the Good Shepherd. The complaint further alleges that the Lutheran Home of the Good Shepherd had long recognized the Union as the exclusive representative of its employees in an appropriate unit and that, based on these facts, Respondent is a successor to the Lutheran Home of the Good Shepherd as of August 31, 1994, and became obligated to recognize and bargain with the Union as the exclusive representative of its unit employees upon its demand for recognition on or about September 2, 1994. The complaint further alleges that Respondent has at all times since that date failed and refused to recognize and bargain with the Union respecting unit employees and has thereby violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act).

The Center denies that it is a successor to the Lutheran Home of the Good Shepherd and further denies that the bargaining unit at issue is appropriate for collective bargaining. Further, Respondent alleges that at all relevant times it had a good-faith doubt that the Union represented a majority of its employees. Respondent, therefore, denies that it was ever obligated to recognize and bargain with the Union and denies that its refusal to do so violated the Act in any way.

On the entire record herein, including my observation of the witnesses and their demeanor, and helpful briefs from the General Counsel, the Charging Party, and Respondent, I make the following

FINDINGS OF FACT[1]

I. JURISDICTION

The Center is a nonprofit corporation, with a health care facility located in Havre, Montana, where since August 31, 1994, it has been providing long-term patient health care services. Based on a projection of earnings from the time of its commencement of operations to the issuance of the complaint, the Center annually enjoys gross revenues in excess of $250,000 and purchases and receives goods and materials valued in excess of $5000 directly from points outside the State of Montana.

The Parent Corporation is a nonprofit corporation with a facility located in Havre, Montana, where it is engaged in providing acute health care and extended health care patient services. The Parent Corporation annually enjoys gross revenues in excess of $250,000 and purchases and receives goods and materials valued in excess of $5000 directly from points outside the State of Montana.

The Center and the Parent Corporation, and each of them, are and have been at all times material employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

1. The Lutheran Home of the Good Shepherd

The Lutheran Home of the Good Shepherd (Good Shepherd) operated a long-term nursing care facility on Fifth Avenue in Havre, Montana (the facility), for many years until the events in issue herein. The facility is a single-story structure with associated grounds and parking lot. The structure consists of an east and west wing with north and south halls centering on administrative offices, dining and kitchen facilities, and a chapel. The facility under Good Shepherd maintained approximately 100 long-term care beds.

On February 20, 1981, in Case 19–RC–100632 following an election held in a stipulated unit, the Board issued a Certification of Representative to the Union asserting, inter alia, that:

> [P]ursuant to Section 9(a) of the National Labor Relations Act, as amended, the [Union] is the exclusive representative of all the employees in the unit set forth below, found to be appropriate for the purposes of collective bargaining in respect to rates of pay, wages,

[1] Where not otherwise noted, the findings herein are based on the admitted portions of the amended complaint, the stipulations or admissions of counsel, and uncontested, credible testimonial or documentary evidence.

hours of employment, or other conditions of employment;

UNIT:

ALL EMPLOYEES OF THE [LUTHERAN HOME OF THE GOOD SHEPHERD] AT ITS HAVRE, MONTANA FACILITY INCLUDING ALL LPNOS, NURSES AIDES, DIETARY AIDES, PHYSICAL THERAPY AIDES, MAINTENANCE EMPLOYEES, LAUNDRY EMPLOYEES, HOUSEKEEPERS AND OFFICE CLERICAL EMPLOYEES, EXCLUDING ALL PROFESSIONAL EMPLOYEES, REGISTERED NURSES, ADMINISTRATORS, ACTIVITY SUPERVISOR, CONFIDENTIAL EMPLOYEES, GUARDS AND SUPERVISORS AS DEFINED IN THE [NATIONAL LABOR RELATIONS] ACT. [Capitalization in the original.][3]

Over the years, the Union and Good Shepherd entered into a series of collective-bargaining agreements covering employees in the unit, the last of which was effective by its terms from April 1, 1994, to August 31, 1995.

2. The Northern Montana Health Corporate family

Northern Montana Health, Inc. is a Parent Corporation of several subsidiary corporations: Northern Montana Hospital, Northern Montana Health Care Foundation, Inc., Northern Montana Chemical Dependency, Inc., and Northern Montana Health Care Center. Northern Montana Hospital (the Hospital) operates an acute care hospital which includes a 33 bed long-term care floor located in Havre. Northern Montana Chemical Dependency operates a chemical dependency facility located adjacent to and connected with the Hospital. Northern Montana Health Care Foundation is a philanthropic organization which supports health care through fund raising and awareness through the community of activities of the organizations and operates from within the Hospital. Northern Montana Health Care Center was incorporated in August 1994 as a corporate vehicle to own and operate the Lutheran Home of the Good Shepherd following the agreement by Northern Montana Health Care to purchase its assets. The Lutheran Home of the Good Shepherd facility operated by the Center is within the community of Havre about a mile from the Hospital.

All members of the Northern Montana Health family are eleemosynary corporations and share a variety of common goals and aspects. The president and chief executive officer of Northern Montana, Inc., David Henry, holds the same positions respecting corporate subsidiaries including the Center and the Hospital. Much of the administration, human resources, recordkeeping, and support services of the various entities are done at least to some extent by Hospital staff under contract with the other entities. Further, as a result of common planning, the corporate family contemplates a centralizing modernization in the coming years which will bring the entities into a more integrated operation on a common site.

[3] LPNOS refers to licensed practical nurses. Nurses aids refers to nursing assistants or certified nursing assistants (CNAs). In practice, rehabilitation therapy employees were treated as CNAs. The unit included ward clerks as well as activity, housekeeping, utility laundry, dietary, and maintenance employees.

B. *Events*

1. The acquisition and transformation of Lutheran Home of the Good Shepherd into the Center

During the few years preceding the acquisition, the Hospital and Lutheran Home of the Good Shepherd were competitors in that each maintained long-term care beds. Over time Lutheran Home of the Good Shepherd came to realize that its physical plant and operations generally required capital infusions which were beyond its means. Its governing board entered into negotiations which ultimately culminated in the sale of its property and assets to Northern Montana Health Care, Inc.'s newly created subdivision, the Center. The record is clear that while the acquiring entities committed themselves to continue to operate the facility without interruption as a long-term care facility, absolutely no commitment was made by the Center in its dealings with Good Shepherd to hire its staff nor to recognize or bargain with the Union.

In summer of 1994, the Union was informed by Good Shepherd that it would be discontinuing operation of the facility. In negotiations into August,[4] the Union and Good Shepherd negotiated and reached agreement on matters related to the closure. While the facility did not discontinue its operations nor discharge its patients, at the midnight transition of August 30 to 31, the facility no longer was operated by nor were the continuing employees employed by Good Shepherd.

During the initial months following the assumption of operations, disregarding eventual changes of logo and generally improved maintenance and related matters resulting from the greater resources of the Center and its desires to generally upgrade service, the operation of the facility from the patient's perspective was similar to that undertaken by Lutheran Home of the Good Shepherd in former times. The greater portion of the supervisory staff was retained, the facility was never closed nor patients removed at any time.

At the time of the transition, Lutheran Home of the Good Shepherd employed approximately 157 employees of whom approximately 74 were unit employees. Respondent undertook hiring in mid-August so that it could continue operations at the facility without interruption. Respondent commenced and, thereafter, continued its operation of the facility utilizing the services of a similar number of individuals of whom some approximately 76 were engaged in duties previously undertaken by Lutheran Home of the Good Shepherd unit employees. Of the approximately 76 so employed by the Center in the same job classifications as the Good Shepherd bargaining unit, some 54 had previously been employed by Lutheran Home of the Good Shepherd in its bargaining unit.

2. Dealings between the Union, the Center, and the Board

The Union was involved in attempting to place its Lutheran Home of the Good Shepherd unit employees in new employment and in shoring up employee support should those employees remain at the facility under Respondent. It monitored the hiring undertaken by Respondent during August and the beginning of September. During this period in-

[4] All dates hereinafter refer to 1994 unless otherwise indicated.

cluding the period immediately after the Center commenced operations, the Union solicited the signing of authorization cards.

The Union sent Respondent a letter dated September 2, 1994, stating in part:

> This is to advise you that the majority of your employees in an appropriate bargaining unit at your Northern Montana Care Center facility in Havre, Montana, have designated the United Food and Commercial Workers Union, Local No. 8 as their exclusive representative for all such employees . . . to become effective August 31, 1994.

The letter recited as the appropriate bargaining unit that which was in place under Lutheran Home of the Good Shepherd as quoted in full, supra.

By letter dated September 12, 1994, counsel for Respondent replied stating, in part:

> The employer has a good faith doubt that your labor organization does in fact represent a majority of its employees in an appropriate bargaining unit and, therefore, disputes your claim of exclusive representation of the employees described in your letter. The employer further disputes the validity of your contention that the described unit is an appropriate unit under the National Labor Relations Act.
>
> Accordingly, on behalf of the employer we have filed a petition with the National Labor Relations Board initiating a representation proceeding before it, to resolve the issues which are presented by your letter.

On September 14, 1994, Region 27 docketed as Case 27–RM–627 a representation petition filed by the Center respecting a lesser included group of employees as compared to the Union's asserted unit, i.e., a unit of the Center's resident care aides, rehabilitation aides, activity aides, and ward clerk employees. The petition indicated the employees in the proposed unit numbered 42.

On September 16, 1994, the Union filed the original charge herein. That charge stated in the portion of the charge form: ''Basis of the Charge'' that the Center was refusing to recognize and bargain with the Union, asserting further:

> This Local Union represented employees at the Lutheran Home, a majority of whom were hired by Northern Montana Care Center. And, who comprise a majority of the potential bargaining unit at the Northern Montana Care Center.

The Regional Director investigated the unfair labor practice charge and the RM petition ultimately dismissing the petition and issuing the complaint herein.

C. *Analysis and Conclusions*

1. The basic law of successorship

In order to better understand the various arguments of the parties, it is appropriate to consider initially the basic law of successorship including the factors which comprise the General Counsel's prima facie case as well as the defenses presented.

The doctrine of successorship is an area significantly mapped out by the Supreme Court. In a series of cases[5] the Court established that a union that had represented a unit of employees of a predecessor employer would enjoy a presumption of continuing majority amongst a successor employer's employees in certain circumstances. Relevant to the instant case,[6] as further fleshed out by the Board in response to the teaching of the Court, the requirements of successorship include: (1) that there be a continuity of work force, i.e., that the successor bargaining unit contain a majority of employees from the predecessor unit represented by the union; (2) that there be substantial continuity of identity in the employing industry, i.e., whether there have been substantial and material changes in the employing industry and; (3) that there be continuity of the appropriate bargaining unit.

If the General Counsel has established these factors, the union enjoys a presumption of majority status which, upon a demand for recognition, obligates an employer to recognize and bargain with the union respecting the unit employees absent a showing by the employer either that majority support is, in fact, lacking or that it had a good-faith doubt based on objective evidence of the union's majority support in the unit.

The parties do not dispute the basic law described above, but litigated each of the noted elements as they applied to the instant case and marshaled able factual analysis and legal authority in helpful briefs. The elements in dispute are initially discussed separately below.

2. Continuity of identity in the employing industry

The Court in *Fall River Dyeing Corp*., supra, 482 U.S. 43, restated the standard to be applied in this area:

> In *Burns* we approved the approach taken by the Board and accepted by courts with respect to determining whether a new company was indeed the successor to the old, 406 U.S. at 280–281, and n. 4. This approach, which is primarily factual in nature and is based upon the totality of the circumstances of a given situation, requires that the Board focus on whether the new company has acquired substantial assets of its predecessor and continued without interruption or substantial change, the predecessor's business operations. *Golden State Bottling Co. v. NLRB*, 414 U.S. at 184. Hence the focus is on whether there is ''substantial continuity'' between the enterprises. Under this approach the Board examines a number of factors: whether the business of both employers is essentially the same; whether the employees of the new company are doing the jobs in the same working conditions under the same supervisors; and whether the new entity has

[5] *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970); *NLRB v. Burns Security Services*, 406 U.S. 272 (1972). *Howard Johnson Co. v. Detroit Joint Bd. Hotel & Restaurant Employees*, 417 U.S. 249 (1974); *NLRB v. Fall River Dyeing Corp*., 482 U.S. 27 (1987), affg. 775 F.2d 425 (1st Cir. 1985).

[6] Significant factors in many successorship cases are not in controversy herein and are therefor not discussed. For example, the General Counsel is not contending that Respondent was obligated from the start of its operation to recognize and bargain with the Union and there is no issue as to when the new entity employed a representative compliment of employees.

the same production process, produces the same products and basically has the same body of customers. See *Burns*, 406 U.S. at 280 fn. 4; *Aircraft Magnesium*, 256 NLRB 1344, 1345 (1982), enfd. 730 F.2d 767 (9th Cir., 1984); *Premium Foods, Inc*., 260 NLRB 708, 714 (1982), enfd. 709 F.2d 623 (9th Cir. 1983).

In conducting this analysis, the Board keeps in mind the question whether those employees who have been retained will understandably view their job situation as essentially unaltered. See *Golden State Bottling Co*., 414 U.S. at 184; *NLRB v. Jeffries Lithograph Co*., 752 F.2d 459 464 (9th Cir. 1985). This emphasis on the employees' perspective furthers the Act's policy of industrial peace. If the employees find themselves in essentially the same jobs after the employer transition and if their legitimate expectations in continued union representation are thwarted, their dissatisfaction may lead to labor unrest. See *Golden State Bottling Co*., 414 U.S. at 184.

Applying the quoted standard to the instant facts: the business of Good Shepherd and the Center—the provision of long-term patient care—is essentially the same, the employees working at the Center are doing essentially the same jobs under primarily the same supervisors. The two entities provide the same service at the same facility to the same body of customers—the inhabitants of northern Montana. As the General Counsel and the Charging Party emphasize, the facial comparison seemingly reveals substantial continuity between the two business enterprises.

Respondent, however, strenuously contests this comparison as facile. Counsel for Respondent notes that while Good Shepherd was a self-contained entity essentially undertaking on its own all necessary tasks, the Center has devolved many aspects of its operations on Northern Montana Hospital including finance/accounting personnel administration, labor relations, records administration, and related matters. Further, it has contracted out to the Northern Montana Hospital its on site dietary, housekeeping, and maintenance functions.

Respondent further notes there have been a variety of changes undertaken with respect to various aspects of facility management, patient care, and policies and procedures. The new administrator, Earnest McNeely, testified at length regarding his implementation of new quality management, patient care procedures, and facility improvements. It is clear that modern ideas and additional resources have been added to the perhaps more old fashioned and straitened operations of Good Shepherd.

Administrator McNeely also testified at length to the long-term plans to consolidate operations of the current 100-bed long-term care Center with the smaller long-term care portion of the Hospital in a new facility to be constructed as part of a consolidated complex at the Hospital site. The consolidation, while still substantially in future, will doubtless have a profound effect on all Center employees.

The General Counsel and the Charging Party make several attacks on Respondent's arguments. First, they argue that Respondent's changes occurring after the time the General Counsel argues Respondent's obligation to bargain attached are post hoc and, therefore, irrelevant to a determination of the propriety of such a bargaining obligation. Further, they note that many of the plans testified to by McNeely even at the time he testified remain far in the future. Second, they note that the types of changes which have been put in place at the facility respecting new theories of quality control, management, and patient care as well as the few improvements which have taken place at the facility are not of particular significance given the continuance of basic operations. Respecting the Center's transfer of finance/accounting, personnel administration, labor relations, records administration, and related matters to Northern Montana Hospital, the General Counsel notes that all such changes must be considered from the employees' point of view and, in that context, are of much lesser consequence than the similarities noted.

Respecting Respondent's contention that the dietary, housekeeping, and groundskeeping maintenance functions at the Center have been contracted to a separate employer, the General Counsel and the Charging Party argue that the Northern Montana Health family is, by application of traditional labor law criteria, a single employer and that no new, separate or different employer is in actuality involved herein.

In support of his single-employer contention[7] counsel for the General Counsel cites the lead case of *Electrical Workers UE Local 1264 v. Broadcast Service of Mobile, Inc*., 380 U.S. 255 (1965), and its progeny for the proposition that single-employer status is established by sufficient demonstration of interrelation of operations, common management, centralized control of labor relations, and common ownership.

Considering all of the above, I find in agreement with the General Counsel and the Charging Party that there is substantial continuity of the business operation involved herein under the Court's standard as set forth in *Fall River Dyeing*, supra. First, as noted supra, essentially the same facility, service, employees, supervisors, and customers are involved. Second, many of the aspects of change Respondent advances as showing differing business entities were implemented after the relevant time period, early September. Thus, many of the changes implemented by McNeely were undertaken only after his becoming administrator on September 19, 1994. Other changes are simply not of sufficient consequence to defeat the substantial continuities noted.

The major issue of the employment of the dietary, housekeeping, maintenance, and grounds staff by the Hospital is resolved for purposes of this stage of the analysis by the resolution of the single-employer contentions of the General Counsel. For, if the Hospital, the Center, and Northern Montana Health Care, Inc. are a single employer, then the otherwise significant differences in employer identity essentially vanish other than as regards appropriate unit issues, discussed infra.

In the instant case there is little doubt that, as to the employees working at the Center facility, the Northern Montana Hospital, the Center, and Northern Montana Care, Inc. are a

[7] The General Counsel at complaint subparagraphs 2(g) and (h) alleges that Northern Montana Health Care, Inc. purchased and thereafter operated Good Shepherd ''through it[s] wholly owned subsidiary, Northern Montana Care Center'' and that the two entities are a single employer operating the facility. While Northern Montana Hospital is not specifically pled as part of the General Counsel's single employer theory, there was no doubt the General Counsel's argument included the subordinate portions of the corporate parent which employed former Good Shepherd unit employees at the Center. On the facts of this case, the General Counsel's pleading is sufficient. See *Automated Waste Disposal, Inc*., 288 NLRB 914 (1988).

single employer. Beyond the common ownership, common president, and chief executive officer, the entities have a common personnel department and centralized control of labor relations. For example, the Hospital's vice president of human resources is responsible for labor relations at the Center, the Hospital, and the Chemical Dependency Center and was personally involved in virtually the entire hiring process respecting the Center in August 1994. Job vacancies at any of the three facilities are posted at all.

Further, as the General Counsel and the Charging Party argue, the relationship of the Center to the Hospital and to Northern Montana Care, Inc. are inextricably connected. Thus, the acquisition of Good Shepherd was by Northern Montana Care, Inc. with the Center serving simply as a corporate vessel to operate the facility. It is clear that the Center was acquired as part of a plan to merge the Good Shepherd's approximately 100-bed long-term care capacity with that of the Hospital's long-term bed capacity in a future consolidation. A current determination—indeed an existing in place and operational plan—that the entities will merge their facilities and operations into a common, unified operation in the future renders the current interests of the Center, the Hospital and their parent sufficiently close that a single employer finding would be compelled even absent the other supporting factors noted supra.

In summary, in reliance on the excellent arguments of the parties, the authorities cited and the record as a whole, I find and conclude that there was substantial continuity between the Good Shepherd and the Center through mid-September 1994.

3. Continuity of the bargaining unit

a. *Arguments of the parties*

The General Counsel alleges in his amended complaint at paragraph 5 that the following employees of Respondent constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All licensed practical nurses, nurses aides, dietary aides, rehabilitation aides, maintenance, laundry, housekeepers, activity aides and ward clerk employees, excluding all professional employees, registered nurses, administrators, activity supervisor, confidential employees, guards and supervisors as defined in the Act.

The unit alleged is the same as the Board certified unit recognized by Lutheran Home of the Good Shepherd save for an apparent update in its job description nomenclature. Thus, if the General Counsel establishes this unit is appropriate, the Lutheran Home of the Good Shepherd unit and Respondent's unit are identical and continuity of bargaining units is established.

Respondent contends however that its licensed practical nurses at the facility are supervisors within the meaning of Section 2(11) of the Act and that Respondent at no time acquiesced in and continues to oppose the inclusion of any supervisors in a bargaining unit.

The General Counsel meets this argument in various ways. First, the General Counsel argues that the licensed practical nurses are not supervisors and are, therefore, appropriately in the unit. Second, the General Counsel advances several arguments in support of his theory even if the licensed practical nurses are found to be supervisors. In this latter category the General Counsel argues that Respondent should have recognized the Union and sought to establish agreement about the exclusion of licensed practical nurses by means of clarification with the Union or the Board by petition. The General Counsel argues:

> Respondent was not free to test the appropriateness of a unit by refusing to bargain as is an employer when testing the appropriateness of a unit at the time it is initially certified by the Board. [The General Counsel's brief at 19.]

As a ''back-up position'' the General Counsel argues that the licensed practical nurses should be taken out of the unit and Respondent be found obligated to bargain respecting the remaining employees.[8]

In a slightly different approach to the issues considered, supra, Respondent further argues that changes occurred in the

[8] Respondent argues on brief that the General Counsel is foreclosed from taking this position because it was not raised either in the pleadings or at the hearing. Further, Respondent cites *Indianapolis Mack Sales & Service*, 288 NLRB 1123 fn. 4 at 1123 (1988), for the proposition that such an alternative position by the General Counsel may not be raised for the first time on brief. Respondent's citation is correct. The facts asserted, however, are not. Thus, contrary to Respondent's contention, I find that the General Counsel explicitly raised such an alternative position at the hearing.

At the hearing several lengthy colloquies occurred among counsel and the judge respecting the disputed supervisory status of the licensed practical nurses and the implications of this dispute to the presentation of evidence, the theory of the General Counsel and the manner in which the issues should be framed. The General Counsel in these colloquies took a variety of positions as noted above and counsel for Respondent argued that the General Counsel had earlier taken the position that under his theory Respondent would be obligated to bargain respecting the licensed practical nurses irrespective of their supervisory status. I believed that the General Counsel had also taken the alternative position that bargaining should be required even if the licensed practical nurses were found to be supervisors and were excluded from the unit, in which case under this alternative theory Respondent would not be obligated to bargaining concerning them.

In that context the following exchange occurred:

> JUDGE ANDERSON: [Initially to Mr. Robinson, Counsel for Respondent]. . . Irrespective of what either the General Counsel said to you or what you believe said, I don't need to resolve that, because what the General Counsel was saying to me now, which is the only thing you have to defend against, is the General Counsel is not saying that anyone or any classification of employees which are statutory supervisors, you should be obligated to bargain about it, is that correct?
>
> MR. RUIBAL [Counsel for the General Counsel]: That is correct, your Honor.
>
> MR. ROBINSON: I don't see how that can be consistent with paragraph 5 allegation, except the following employees are, constitute a unit appropriate for bargaining and they assert licensed practical nurses are an inappropriate bargaining unit.
>
> JUDGE ANDERSON: They hope to prove they're not supervisors. If they fail that, their backup position is take [them] out and bargain about the rest.
>
> MR. RUIBAL: Correct.

In my view this exchange rises to the level of a clearly expressed alternative theory of the type at issue herein by the General Counsel.

manner in which certain elements of the former bargaining unit employees were employed. Thus, Respondent argues:

> [T]he dietary, housekeeping and maintenance employees are not employed by the Northern Montana Care Center, they are employed by Northern Montana Hospital, and that is because there was, at least primarily in the beginning, and even to a lesser extent now, some interchange between those functions between Hospital and Care Center; for example, the maintenance function is covered by the same people who deal with both the hospital and the Care Center.

In its RM petition, noted supra, Respondent proposed a unit of patient care aides, rehabilitation aides, activity aides, and ward clerk employees. Respondent did not suggest in the instant case, however, to what unit or units the Hospital employees employed at the Center belong.

The General Counsel argues that the employees in these departments are part of the appropriate bargaining unit under traditional representation law community of interest standards. To the extent they are simply employed by a separate corporation, the General Counsel argues, it has pled and established that the Northern Montana Care family of corporations are in effect a single employer for purposes of the successorship issues herein.

These various arguments are discussed separately below.

b. *Is Respondent foreclosed from challenging the composition of the bargaining unit prior to recognizing the Union?*

The General Counsel with the concurrence of the Charging Party argues explicitly that Respondent may not challenge the appropriateness of the unit prior to recognition of the Union nor may it base a refusal to recognize the Union on contentions of an inappropriate unit. The General Counsel and the Charging Party ground their argument on the initial Board certification and years of bargaining history respecting the unit. If the LPNs, herein, are supervisors or the unit is otherwise inappropriate, the long history of bargaining demonstrates that the unit was voluntarily agreed upon. Therefore, the General Counsel argues, the parties may not now challenge the unit. In support of his argument, the General Counsel cites authority for the Board's longstanding proposition that if a contract includes statutory supervisors, the parties are required to apply the terms of the contract to the supervisor unit members during its life.

I reject the General Counsel's and the Charging Party's arguments as conceptually misfounded. The General Counsel's arguments would well apply to Good Shepherd were it to have challenged the appropriateness of the unit in midcontract. Respondent herein is not contended to be the employer who voluntarily entered into such an agreement. Rather, Respondent is contended by the General Counsel to be a successor. Since *Burns*, successors have not been held to have assumed the contract. Even were Respondent herein held equivalent, for purposes of this analysis, to an employer whose contract has expired, such an employer may in fact challenge the appropriateness of the bargaining unit if it includes supervisors. As the Board noted in *Arizona Electric Power Cooperative*, 250 NLRB 1132, 1134 fn. 10 (1980):

> Respondent's duty to bargain concerning them [supervisors] would terminate on the expiration of the current contract provided that Respondent took appropriate steps to contest their continued inclusion in the unit.

In *Washington Post Co*., 254 NLRB 168 (1981), the Board stated at 169:

> While it may be that certain of the positions sought to be excluded by a unit clarification petition have long been included under previous contracts, and the job duties of these positions have remained unchanged, nonetheless, if it can be shown that the persons in such positions meet the test for establishing supervisory . . . status, we are compelled to exclude them.

I find no basis for denying to Respondent the same right to review unit composition when faced with a demand for recognition based on an alleged successorship relationship, that any employer who was not then bound by a collective-bargaining agreement enjoys.[9]

Nor do I find that Respondent is precluded from raising the unit issue before recognizing the Union. The General Counsel's argument seems to be that, irrespective of its merits, as a matter of law an employer in the circumstances presented herein may not, prerecognition, assert an inappropriate bargaining unit as a defense to a successorship failure to recognize and bargain unfair labor practice allegation. Whether or not Respondent's defenses prevail, surely they may be presented in defense to the allegations of the complaint. The General Counsel offers neither persuasive reasoning nor citation of authority for such an unusual proposition. Accordingly, given all the above, I find there is no basis to preclude Respondent's raising the unit issues as a defense to its refusal to recognize and bargain with the unit.[10]

c. *The Appropriate Bargaining Unit at the Center*

(i) The Board's unit standards for nonacute health care facilities[11]

The Board has recently devoted substantial decisional and rulemaking time and energy addressing unit issues in the health care industry. That course, in so far as it pertains to nonacute health care facilities, is reviewed in *Park Manor Care Center*, 305 NLRB 872 (1991), wherein the Board set forth its standards for determining appropriate bargaining units in such facilities in future. The Board in essence declined to establish a short list of presumptively appropriate units as it had for the acute care facilities in the Board's Rules and Regulations Section 103.30, see also the rulemaking record set forth at 284 NLRB 1527 (1987), and determined to make unit determinations in nursing homes by

[9] This holding in part answers Respondent's plaintive argument that the Regional Director has never given it a hearing on the unit issues it raised. Respondent is in fact entitled to such a hearing and that opportunity occurred as part of the instant proceeding.

[10] Having reached this conclusion it is not necessary to consider Respondent's argument that the issue respecting supervisors arose as a result of the Supreme Court's March 1994 decision in *NLRB v. Health Care & Retirement Corp*., 128 L.Ed.2 586 (1994).

[11] The recent Supreme Court decision respecting licensed practical nurses in nursing homes, *NLRB v. Health Care & Retirement Corp*., 128 L.Ed.2 586 (1994), is discussed elsewhere in this decision.

adjudication. The Board held that such unit determinations would be made by taking a broad approach considering not only traditional community of interest factors, but the information gathered during the rulemaking process and prior precedent.

One such general presumption which, although left to adjudication under the Board's Rules, 284 NLRB 1527, 1532 (1987), and susceptible to rebuttal, seems to remain applicable to the health care industry is that of a single-facility presumption. *Manor Healthcare, Corp*., 285 NLRB 224 (1987). See also *Mercywood Health Building*, 287 NLRB 1114 (1988). Further while the placement of licensed practical nurses in a variety of situations remained a matter of case by case adjudication, the general service and maintenance units which included certified nursing assistants have not seemed to be in controversy.

(ii) Are Respondent's licensed practical nurses supervisors?

The five licensed practical nurses employed at the Center regularly are assigned the role of ''charge nurse.'' Charge nurses are assigned a particular wing of the facility and are responsible for the residents and staff in that area. Charge nurses assign work to and direct the certified nurse assistants (CNAs) in certain aspects of patient care. Charge nurses can and do transfer, send home, or direct that employees be called at home based on staffing requirements. In their assigned areas they train employees, forgive tardiness, and approve overtime. In matters respecting discipline, charge nurses are authorized to issue oral or written warnings and reprimands. They counsel employees on work performance, investigate employee situations which have the potential to require discipline, and adjust disputes between CNAs. Credible testimony was received that at least some licensed practical nurses consider themselves supervisors and that at least some employees consider the licensed practical nurses as charge nurses to be their supervisors.

The General Counsel in essence concedes that licensed practical nurses as charge nurses exercise many of the authorities enumerated in the statutory definition of a supervisor contained in Section 2(11) of the Act,[12] but argues such exercises involve no more than routine or clerical acts not requiring the use of independent judgment.

The cases cited by the General Counsel and the Charging Party respecting the issue of use of independent judgment address both licensed practical nurses acting as charge nurses in the long-term care setting and other situations. The charge nurse cases, such as *Manor West, Inc*., 313 NLRB 956 (1994), cited by the Charging Party, often find that much of what charge nurses in nursing homes in a supervisor context do is routine and/or does not involve the use of independent judgment. In *Manor West* and other cases both before and after the Board's issuance of the lead case in the area, *Northcrest Nursing Home*, 313 NLRB 491 (1993), however, the Board has also noted that as regards the direction of aides respecting patient care, a licensed practical nurse acting as a charge nurse may give directions which are not routine and involve independent judgment. The Board in these cases following Northcrest found that such use of independent judgment respecting patient case matters was not undertaken ''in the interest of the employer'' and was therefore not a basis for finding the charge nurses to be supervisors under the Act.

The Supreme Court in *NLRB v. Health Care & Retirement Corp*., 128 L.Ed.2 586 (1994), specifically rejected the Board's Northcrest ''in the interest of the employer'' analysis and found such charge nurse direction to aides to be evidence of supervisory status.

The record evidence in this case suggests at the very least that the licensed practical nurse employees in question have and exercise the authority to give similar direction to staff. Without going further, I find that there is no serious question that the Center licensed practical nurses when acting as charge nurses give direction to the CNAs which is not of a routine nature and involves the use of independent judgment. On that basis alone, I find the licensed practical nurses are supervisors within the meaning of Section 2(11) of the Act.

(iii) Circumstances respecting the Center's dietary, housekeeping, and maintenance and grounds employees

I have found, supra, that the Northern Montana Health Care, Inc., the Hospital, and the Center are a single employer for purposes of employees employed at the Center. The fact that the Hospital employs and supervises the dietary, housekeeping, and maintenance and groundskeeping staff is therefore not necessarily a fatal impediment to including them in the Center bargaining unit. This single-employer finding, however, as the parties recognize, is not dispositive respecting the appropriateness of such inclusion. It is appropriate to consider each category of employees.

(a) *The Center based dietary employees*

The dietary staff under the Good Shepherd comprised some 19 unit employees and additional dietary and nutrition supervisors. As noted, supra, the Center by August 23 had determined that due to insufficient interest among the Good Shepherd dietary staff, there was a shortage of dietary staff employment applicants for the Center[13] and, further, that the Hospital would supply dietary services utilizing both current and newly hired hospital employees under the supervision of hospital staff. Respondent's prepared summary indicates that the Hospital employed 19 nonsupervisory dietary employees of whom some three were former Good Shepherd unit employees and 3 nutrition supervisors who spent the majority of their time at the Center but, in the testimony of Collyn Peklewsky, hospital vice president of human resources, ''might work at the Hospital if we needed them there.'' The Hospital's director of nutrition services physically located at the Hospital was in charge of the nutrition services of both the Hospital and the Center.

[12] Sec. 2(11) of the Act states:

The term ''supervisor'' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the forgoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

[13] There was uncontested testimony that the relatively limited population in the Havre commuting area limited the number of potential job applicants during relevant periods.

The dietary staff that moved over from the Hospital to the Center, remain hospital employees. Some dietary employees work largely at the Center with some time at the Hospital others spend a greater portion of their time at the Hospital. Peklewsky estimated these employees to number approximately 10. None work exclusively at the Center. Other hospital employees, those who were originally hired to work at the Center, work exclusively at the Center although they remain hospital employees. These essentially exclusively Center based hospital dietary employees number 12 to 15.

(b) *The Center building and grounds/maintenance staff*

The Good Shepherd unit included two maintenance employees and one utility employee as well as one supervisor of these employees. The Hospital hired all of these employees and combined them with its existing building and grounds staff to form a group of some six employees and two supervisors. The decision was taken to employ these employees through the Hospital to be able to provide additional supervision by hospital managers. There was undisputed testimony that the Hospital building and grounds staff work at both the Hospital and Center locations.

(c) *The Center environmental services or housekeeping/ laundry staff*

The Good Shepherd employed some five housekeeping/ laundry employees. The Hospital employs some five housekeeping employees (which are the sole positions within its environmental services category) at the Center of whom four are former Good Shepherd unit employees. These employees were hired as hospital employees essentially for the same reason as grounds employees. Peklewsky testified:

> Same decision [to employee the Center based employees as Hospital employees] was made although the need wasn't quite as critical, the same decision on the maintenance, housekeeping staff, because there was a manager there but the manager was fairly inexperienced and needed the support, well, we felt, needed the support of our more experienced management.

She testified further that the small staff at the Center is permanently assigned there but that in circumstances of illness hospital based housekeeping staff are temporarily assigned to the Center. During those periods of temporary assignment the employees continue to receive their hospital location terms and conditions of employment.

(d) *The terms and conditions of employment of Hospital and Center employees*

The hospital employees who had previously been employed by the Hospital at the Hospital and who were physically moved to the Center on a permanent basis retained their hospital seniority and tenure as hospital employees. Employees hired at the Center as center employees began as new employees with no seniority irrespective of whether or not they came from the Hospital or Good Shepherd with prior service. Employees in the employ of the Center have their own personnel policies and procedures. The personnel policies which apply to hospital employees differs to some degree from those which apply to Center staff.[14]

A pay matrix was created before the Center commenced operations for all job classifications employed by either the Hospital or the Center for those who were working at the Center on other than a temporary basis. These wage rates are not identical to Hospital employee rates for hospital based employees in the same classifications. When hospital employees are temporarily assigned to the Center on a fill in basis they retain their hospital wages and pension plan credits, etc. The Center pay matrix for center based employees includes wage rates for all classifications working at the Center including the classifications in controversy herein. Thus dietary employees, groundskeepers, housekeepers—even though hospital employees—receive unique Center matrix wages when regularly employed at the Center. When not regularly employed at the Center they receive normal hospital wages irrespective of where they are working. An occasional or erratic employment at the Center by a hospital employee, therefore, does not change that employee's wage to a Center rate. Since the Center location pay matrix includes the groundskeepers and technicians within the maintenance department, and since the grounds keeper and technician wage rates were updated in February 27, 1995, it seems clear that that department as well as the others continued to have employees sufficiently permanently assigned to the Center to justify having a pay scale for such employees.

(iv) Conclusions regarding the center appropriate bargaining unit

It is necessary to determine what the appropriate unit was as of the time of the Union's demand and immediately thereafter. A starting point is the Good Shepherd unit which the General Counsel and the Charging Party contend remains the appropriate unit at the Center. As the Board noted in the recent decision in *Trident Seafoods*, 318 NLRB 738, 739 (1995):

> [T]he issue in a successorship situation is not whether a previously unrepresented unit is appropriate, but whether a historically recognized unit is no longer appropriate. [Fn. omitted.]

The issues for resolution are whether or not any or all of the following classifications, included in the Good Shepherd unit, should be included in the Center unit: licensed practical nurses, dietary employees, housekeeping employees, and grounds and maintenance employees.

As noted above, I have found the Center's licensed practical nurses are supervisors within the meaning of Section 2(11) of the Act. As such, when their inclusion is opposed by the employer, they are not appropriately part of a bargaining unit. I shall, therefore, exclude them from the unit.

Respecting the other disputed categories, they are not by their very nature improperly included in a long-term care facility. There has been a history of collective bargaining under Good Shepherd with respect to them as part of the larger

[14] For example the Hospital supplied prepaid life insurance equal to a rounded up annual wage, the Center provides an amount 50 percent larger.

proposed unit. Without more their inclusion in the unit would be essentially automatic.

Respondent raises two separate issues respecting these categories of employees. Respondent first argues that these categories of employees are employed by the Hospital not the Center. I have found supra, that the Center and the Hospital are part of a single employer which operates these facilities. I find, therefore, that this fact is not, standing alone, a basis for excluding these employees.

Respondent's second argument in this context is more significant. Respondent notes that along with their employment by the Hospital, the employees in these classification are subject to Hospital as opposed to Center supervision, personnel polices, and practices which, as noted supra, are, to at least some extent, different. Further, while there are many Hospital employees in these classifications who are essentially permanently at the Center, others are only there intermittently and when working there on that basis receive wages different both from Center employees and Hospital employees working at the Center on a more permanent basis. Thus, Respondent argues that employees in these classifications have a different community of interest from the Center employees and the entire classifications should be excluded from the Center unit.

Respondent's arguments are worthy of consideration, but when considered in the balance with other factors, they are not in my view sufficient to support exclusion of all hospital employed employees from the unit. Initially, all the arguments herein must be judged in the context of my single-employer finding, supra. Thus, there is, in essence, only one employer at the Center. Further, there remain important aspects of commonality of interest between the hospital employees who regularly work at the Center and the Center employees. The classifications employed by the Hospital and those employed by the Center have a long history of being in the same bargaining unit, working together in a single facility with their fellow former Good Shepherd unit members and under Respondent continue to work together at the same facility. The hospital employees who are permanently at the Center—as noted supra, a significant number of employees—are paid from a common wage matrix which they share with Center employees and no others.

To the extent there are employees who pass between the facilities on an ad hoc, irregular or sporadic basis, these employees clearly receive hospital terms and conditions of employment including wages taken from a wage matrix applicable to Hospital based Hospital employees and independent of the matrix applicable to all employees regularly at the Center. Such irregular employees, as other sporadically or impermanently employed employees under normal Board representation law, should not be included in the Center unit, but rather have a clearer community of interest with hospital employees who work exclusively at the Hospital. The arguments Respondent makes for excluding all the employees in the disputed classifications from the unit in fact apply with some force to these employees. Since it is traditional to exclude from a bargaining unit those employees who are irregularly employed and have no expectancy in the future of regular employment in the bargaining unit, I find it appropriate to exclude for the Center location bargaining unit all employees, the Center or the Hospital employed, who are irregularly employed at the Center. Removing these employees from the unit and therefore the classifications in contest, makes the inclusion of the remaining regularly Center employed employees in the unit irrespective of their classification far more satisfactory.

Describing a bargaining unit's inclusions and exclusions on the basis of a hospital employee's individual expectancy of regular employment at the Center, rather than by including or excluding entire job classifications irrespective of location or regularity of employment, is well suited to identifying individual employee's community of interest and segregating employees into particular units. Such distinctions may also in some circumstances smack of the ivory tower and, in application, threaten not to achieve the desired matching of interests, but rather leave rough edges and loose ends which invite uncertainty, controversy and future dispute. Classifications must be susceptible of practical application. Without such practicability the unit determination made herein would be inappropriate. I have reviewed the entire record and the arguments of the parties respecting the unit issues with this question in mind however, and I am satisfied that the unit description herein is easily and unambiguously administered.

The dividing line between the Hospital employees included in the unit and those excluded from it may be objectively established by continued use of the system which was put in place by Respondent at the time the Center opened and has apparently been carried forward to date. Thus, the Hospital employees who have been paid under the Hospital-Center joint wage matrix—in evidence as Respondent's Exhibit 4A—are appropriately included in the unit. Those Hospital employees who have been regarded as sufficiently temporary in their service at the Center so that they remain on the Hospital wage matrix for hospital based employees are excluded from the Center unit as—from the Center's perspective—temporary or nonpermanent employees. Thus, the commonality of wages and expectancy of continued employment at the Center, which form the basis for retaining certain employees in the Center unit, is the same as the work pattern which causes Respondent to pay hospital employees under the Center matrix. Symmetrically, the sporadic and irregular Center employment of some hospital employees who are excluded from the unit for that reason are, for the same reason, retained by the Hospital on the Hospital wage matrix or system.

On this record, I believe that in a world of difficult choices and necessary approximations, the unit found is not only an appropriate unit but is the most appropriate unit which may be found at the Center. As noted, the line between the Hospital employees who so regularly work at the Center that they are included in the unit and those who work so irregularly at the Center that they are excluded from the bargaining unit seem difficult to apply. Importantly however, in the instant case, Respondent has however been making these identical distinctions throughout the life of the Center in determining what wage to pay Hospital employees either the Center based wage for the given classification or the Hospital wage for that same classification. The hospital employees who, when they work at the Center, receive either Center matrix or hospital pay according to the regularity of their employment at the Center are equally experienced in the different accounting of hours and remuneration. This being so I find that Respondent would be hard put to argue the distinctions made herein are impossible or even difficult

to apply. It must simply continue to do what it has consistently done to date and what the Board frequently does in bargaining unit determinations, i.e., include employees in the unit who work and expect to work regular hours and exclude from the unit employees with irregular hours who have no reasonable expectancy of continued Center based employment.

I am further assured that this unit determination is appropriate when I consider the alternatives. As noted supra, in the health care industry an unnecessary proliferation of bargaining units is to be avoided. So, too, the Board should not create fragmentary, multifacility health care units which would likely increase the chance of labor difficulties and disruption of health care services. If the classifications at issue herein are not to be included with the other noncontested classification, in what units would they be appropriately placed? If any or all the Hospital and Center based hospital dietary, housekeeping, or grounds employees are held to be only appropriately included as a multifacility unit, both the admonitions against multifacility units and unit proliferation will have been breached.

Given all the above, and on the basis of the record as a whole I find the following unit is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> Employees of Northern Montana Health Care Hospital and Northern Montana Health Care Center regularly employed at the Northern Montana Health Care Center in the following job classifications: nurses aides, dietary aides, rehabilitation aides, maintenance, laundry, housekeepers, activity aides and ward clerk employees, excluding all professional employees, registered nurses, licensed practical nurses, administrators, activity supervisors, confidential employees, guards and supervisors as defined in the Act and all employees irregularly employed at the Center.

d. *Conclusions respecting continuity of the bargaining unit*

The bargaining unit found appropriate at the Center at the commencement of its operations, set forth immediately above, is different from that which had been certified by the Board and a subject of bargaining for almost 15 years at Good Shepherd. The units differ in substance in only a single classification:licensed practical nurses.

Under Good Shepherd the unit description on its face included licensed practical nurses and excluded supervisors. The parties consistently treated all the licensed practical nurse employees as nonsupervisors and bargained respecting them including the results of their bargain in a series of collective-bargaining agreements. The Center unit found appropriate herein specifically finds the classification of licensed practical nurses at the Center to be supervisory and specifically excludes them from the unit. Respondent argues that such a variance between the Good Shepherd and Center units destroys the continuity of the bargaining unit necessary for a finding of continuity of bargaining units. The General Counsel and the Charging Party argue to the contrary.

The General Counsel and the Charging Party on brief cite a number of Board and court cases for the proposition that the successor bargaining unit need not be the same as the predecessor unit, nor even be the significant portion of it. The Charging Party cites the Board case of *Stewart Granite Enterprises*, 255 NLRB 569, 573 (1981), wherein the Board approved the following language of the administrative law judge:

> [I]t is established that successorship obligations are not defeated by the mere fact that only a portion of a former union-represented operation is subject to the sale or transfer to a new owner, so long as the employees in the conveyed portion constitute a separate appropriate unit, and they comprise a majority of the unit under the new operation. *Zim's Foodliner, [Inc. v. NLRB*, 495 F.2d 1131 (7th Cir. 1974), cert. denied 419 U.S. 838 at 1141 (1975)]. *Saks and Company [v. NLRB*, 634 F.2d 681 at 682 (2d Cir. 1980)]. See also *Atlantic Technical Services Corp*., 202 NLRB 169, 175 (1973), and cases cited.

See also *Trident Seafood Foods, Inc*., 318 NLRB 738 (1995).

The main thrust of Respondent's arguments and citations of authorities in this area address the appropriateness of the Center unit—a matter discussed supra—and the issues surrounding the Union's demand for recognition—an issue discussed infra. Subtracting those arguments, what seems to remain respecting the continuity of bargaining unit is that the instant case differs from the situations presented in the cases cited by the General Counsel and the Charging Party in that the new employer herein acquired all the classifications in the previous employer's recognized unit. but that some of those classifications are not properly part of the new unit.

I have found no cases which match the precise factual situation presented here, i.e., discussing successorship unit continuity where the new unit differs from the old unit not because only a portion of the operation was acquired but rather because the old unit was inappropriate.[15] I am able to perceive no significant difference between a situation where the new bargaining unit arises as a result of a partial assumption of the predecessor's operation or because the appropriate unit simply excludes some of the employees previously included in the predecessor unit. The test of unit continuity turns on the roots or origins of the predecessor's appropriate unit employee compliment. In both the situations discussed in the cases cited, supra respecting partial acquisitions and the situation herein where licensed practical nurses are excluded from a unit, the new units are both appropriate under Section 9 of the Act and have a direct relationship to a portion of the predecessor unit.

Accordingly, based on all the above and the record as a whole, I find that the Center bargaining unit found appropriate above has a close continuity and consistency with the Good Shepherd unit.

[15] Respondent advances the Board's decision in *Renaissance West Mental Health Center*, 276 NLRB 441 (1985), as on point. That decision addressed a successorship situation wherein the predecessor's unit was inappropriate for the successor, but is distinguishable because the judge with Board approval found no appropriate successor bargaining unit could be ascertained and therefore no bargaining obligation could attach to the new employer.

4. Continuity of the work force—the issue of majority

The test of majority applies to the employee compliment of the new unit not the old. Thus, the new unit is examined to determine how many of its employees were from the predecessor unit. In the instant case the test is: How many of the employees in the Center bargaining unit found appropriate, supra, in early September were from the Good Shepherd unit?

Based on a comparison of the Good Shepherd unit list as of the closure with Respondent's lists of employees initially working at the Center identified by classification it is possible to determine for all classifications what proportion of the employees were from the Good Shepherd unit.[16] Of the approximately 70 employees in the Center unit, approximately 50 were from the equivalent categories in the Good Shepherd unit. Thus, a substantial majority of employees in the Center unit were from the Good Shepherd unit. Indeed Respondent does not in numerical terms contest the General Counsel's contentions of unit majorities.[17]

Given all the above, I find there is very substantial continuity of work force between the Good Shepherd unit and the Center unit.

5. Issues respecting the Union's demand for recognition on the Center

The Union sent the Center a demand letter dated September 2 which stated in part:

> This is to advise you that the majority of your employees in an appropriate bargaining unit at your Northern Montana Care Center facility in Havre, Montana, have designated the United Food and Commercial Workers Union, Local No. 8 as their exclusive representative for all such employees . . . to become effective August 31, 1994. The bargaining unit consists of:
>
> > All licensed practical nurses, nurses aides, dietary aides, rehabilitation aides, maintenance, laundry, housekeepers, activity aides and ward clerk employees, excluding all professional employees, registered nurses, administrators, activity supervisors, confidential employees, guards and supervisors as defined in the [Act].

Respondent makes several arguments respecting the Union's demands which are separately addressed below.

[16] Respondent's exhibit lists employees who starting on August 31, 1994. Given that the Center commenced full operation on that day and there is no contention that a full compliment of employees was not on board as of that date, it is unlikely significant changes in the Center's employee compliment occurred in the first fortnight or so of its operations. Respondent does not make such a contention. Were such a contention to have been made in the circumstances presented here, Respondent who would have such information within its knowledge and control, would have been obligated to present it.

[17] The ratios of Good Shepherd unit employees to Center employees in various of the classifications has been set forth in earlier portions of this decision for other purposes. Essentially without exception any bargaining unit proposed at the Center on this record was comprised of a majority of Good Shepherd unit employees.

a. *Respondent's contention that the Union's demand did not inform Respondent of the Union's claim to a successorship bargaining obligation*

Respondent argues that the Union's demand letter did not put it on notice that the Union was claiming that Respondent was obligated to recognize and bargain with the Union because of a successorship relationship with the Good Shepherd bargaining unit. Respondent makes its argument primarily in the context of its good-faith doubt defense addressed, infra. It is also discussed here, however, because of the following argument of Respondent. Respondent argues that: (1) since the Union's demand seemed on its face to be based on the Union's purported acquisition of an authorization card majority and that Respondent had no reason to believe otherwise; and (2) since employers are not obligated to recognize a labor organization simply because of an asserted or, without more, even an actual acquisition of majority employee support without an election or other circumstances not relevant herein, it follows that Respondent's denial of recognition was proper because it was simply not on notice of the successor theory and was entitled in law to deny recognition and seek an election under the theory of recognition the demand letter fairly implied.

Respondent's argument raises both factual and legal issues. There is dispute respecting what Respondent knew or should have known at relevant times. Further, there is the simple legal issue of whether a demand for successorship recognition needs carry a theory of obligation to trigger the bargaining obligation. I reach neither issue herein, however, because I find that, for the reasons appearing below, the issue was rendered moot and its resolution is therefore unnecessary to fully address the issues raised by the complaint.

On September 16, 1994, the Union filed the original charge herein. That charge, which the complaint alleges and the answer admits was served on Respondent that same day, stated in the portion of the charge form: ''Basis of the Charge'' that the Center was refusing to recognize and bargain with the Union, asserting further:

> This Local Union represented employees at the Lutheran Home, a majority of whom were hired by Northern Montana Care Center. And, who comprise a majority of the potential bargaining unit at the Northern Montana Care Center.

There is no dispute that when Respondent received this charge it understood the Union's theory of successorship underlying its demand for recognition and assertion that Respondent was obligated to recognize and bargain with it.

The Board with the specific approval of the Supreme Court in *Fall River Dyeing Corp.*, 482 U.S. 27 (1987), holds that a Union's demand in a successorship setting is continuing and, if not initially applicable attaches when circumstances allow. Since it is immaterial to the resolution of the issues of this case whether the Union's demand was sufficient on September 2 or 16, and since it is not in dispute that Respondent understood the Union's demand to be a successorship demand on September 16, I find that it is un-

necessary to determine when during that period the demand became sufficient in law.[18]

b. *The consequences of the variance in the bargaining units of the Union's demand, the General Counsel's complaint, and the unit found appropriate herein*

The Union in its demand letter and the General Counsel in his complaint sought Respondent recognize the Union in the Good Shepherd unit. The unit found appropriate herein differs. Disregarding the nonsubstantive nomenclature changes, the unit sought by the Union and the General Counsel differed from the unit found appropriate herein in the inclusion of the classification licensed practical nurses. These employees at relevant times numbered five so that the unit sought by the Union and the General Counsel contained 75 unit employees; the unit found appropriate herein contained 70.

Respondent argues that the variance between the unit sought and the unit found is fatal to the allegations herein. The General Counsel and the Charging Party argue rather that the variance is of no consequence and that, at least as an alternative theory, Respondent should simply be ordered to recognize and bargain with the Union in the unit found appropriate.[19]

The Board with court approval holds that at least some variation between the units in which a union seeks recognition and/ or the General Counsel alleges a failure of bargaining has occurred and the unit found appropriate by the Board. There are two types of variations discussed in the cases: variations in the numbers of employees and variations in the unit description or composition.

The cases suggest that differences in the numbers of employees in the units sought as compared to the units found may vary quite widely without fatal consequences. The following variations in number of employees were held inconsequential. *Fosdal Electric*, 367 F.2d 784, 787 (7th Cir. 1966), enfg. 153 NLRB 85 (1965) (demand for unit of 7, unit of 10 found appropriate, an increase of over 40 percent); *United Butchers Abbatoir, Inc*., 123 NLRB 946, 956 (1959) (demand for unit of 28, unit of 25 found appropriate, a decrease of over 10 percent). The difference in numbers involved herein is 75 in the unit sought and 70 in the unit found appropriate a decrease of less than 10 percent. I find the difference in the numbers of employees involved is inconsequential.

The Board and courts have also addressed variations in the unit description language or classifications included or excluded on a number of occasions. Thus, in *Fosdal Electric*, supra, the original demand and complaint unit addressed electricians and helpers but the appropriate unit was found to be production and maintenance. The variation was considered inconsequential. The Board and court determinations that such distinctions are inconsequential have extended not only to general work categories but also to specially treated categories under the Act such as guards. In *Dan River Mills, Inc*., 121 NLRB 645 (1958), the union sought a production and maintenance unit which included watchmen but excluded guards. The watchmen were found by the Board to be guards and hence excluded by provision of the Act. The employer sought to defend its refusal to bargain on the unit variance. The Board held at 651: ''[E]ven where guards are improperly included in the unit for which a union seeks to bargain, this is no defense to a charge [against an employer] of a refusal to bargain.'' [Fn. omitted.]

The Board cases cited above generally arose in situations where the union demand was based on initial organizing card majorities. Since the instant case arises in the successorship context, the Board's decision in *Hydrolines, Inc*., 305 NLRB 416 (1991), is relevant. The Board noted at 420:

> A bargaining demand in a successorship situation is made in a different context, however, from demanding initial bargaining based on a card majority. [footnote omitted] When a union demands bargaining based upon a card majority, the union is aware of which group of employees it has been organizing and wishes to represent; the employer may not. On the other hand, in a successorship situation, the union, by making a bargaining demand, is attempting to preserve its status as the bargaining representative of an already defined unit, or that portion of the unit which has been conveyed or preserved. The successor, however may add employees. It may add, eliminate, or change job classifications. It may have plans to expand or change its operations. [footnote omitted] The union may be unaware, or at least uncertain, as to the successor's plans for its hiring and operations. Therefore, the union's bargaining demand may be made before it is clear which of the successor's employees belong in the unit, and the union cannot be expected or required to take all possible contingencies into account in making its demand to bargain.[27]

The Board cases cited, supra, regarding variance in the unit inclusions and exclusions between and among union initial organizing card majority demands, unfair labor practice complaints and appropriate unit findings convince me that, even were this case such an initial organizing card majority case, the variations at issue herein are inconsequential. The

[18] Were it necessary to do so, I would find that a Union's demand letter in a successor setting need not set forth its theory of the successor employer's obligation to bargain. The general rule is set forth in *Al Landers Dump Truck*, 192 NLRB 207, 208 (1971), enfd. sub nom. *NLRB v. Cofer*, 637 F.2d 1309 (9th Cir. 1981):

> The Board and the courts have repeatedly held that a valid request to bargain need not be made in any particular form, or in haec verba, so long as the request clearly indicates a desire to negotiate and bargain on behalf of the employees in the appropriate unit concerning wages, hours, and other terms and conditions of employment.

[19] This alternative theory of the General Counsel was found timely raised. See fn. 8 at p. 9 of this decision, supra.

[27] The Board, with the approval of the Supreme Court, has previously recognized some of the unique problems a union faces when making a bargaining demand to a successor employer. Thus, in *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27, 52–53 (1987), the Court held that the ''continuing demand'' rule is reasonable. The Court reasoned that the rule ''places a minimal burden on the successor and makes sense. . . .'' The Court noted that this was true ''[b]ecause the union has no established relationship with the successor and because it is unaware of the successor's plans for its operations and hiring, it is likely that, in many cases a union bargaining demand will be premature.'' The Court noted, by contrast, that in the initial recognition context the union ''is in the best position to have access to the relevant information—whether the union has the majority support of employees.'' Id. at 53 fn. 19.

fact that the instant case is a successor case and governed by the teachings of *Hydrolines, Inc*., supra, *Fall River Dyeing Corp*., supra, and *Finishing Corp. v. NLRB*, as quoted immediately above, redoubles my conviction that the variations between demand, complaint, and the ultimate Center bargaining unit are immaterial to the resolutions of the issues of the case.

Another aspect of unit variation defenses raised by employers and discussed in the cases—and independent of the merits of the other issues discussed above—is whether or not the variation in the unit sought and the unit found would as a matter of fact have had any real effect on the employer's refusal to bargain. Thus, the court in *David Wolcott Kendall Memorial School v. NLRB*, 866 F.2d 157 (6th Cir. 1989), enfg. 288 NLRB 1205 (1988), recognized a divergence in the unit sought by the union and alleged by the General Counsel and that found by the Board to be appropriate. The court found the divergence concerned only five individuals and did not justify the employer refusal to bargain. The court further noted, however, that the employer had based its refusal to bargain on other aspects of the case not sustained by the Board or court and held, at 161:

> Nothing in the record disclosed that [the employer] would have recognized and bargaining with the Union even if the unit [had not been at variance].

Similarly the court in *Shipbuilders v. NLRB*, 320 F.2d 615, 617–618 (3rd Cir. 1963) cert. denied sub. nom. *Bethehlem Steel Co. v. NLRB*, 375 U.S. 984 (1973), enfg. 133 NLRB 1347 (1960), sustained the Board in finding ''more apparent than real'' and hence not tenable the contention of an employer that it was relieved of an obligation to bargain because the unit alleged by the General Counsel contained ''personnel classifiable as supervisors and within the purview of the statute.'' The administrative law judge, with Board approval, had found the supervisory inclusion issue while real and ongoing between the parties was insignificant and not a factor in comparison to the substantial issues raised, 133 NLRB at 1349.

On this record, and in particular relying on Respondent's consistently held view that the bargaining unit did not include the hospital employees as well as the licensed practical nurses and that it had a good-faith doubt of the Union's majority in the unit, I find that, even had the Union demanded recognition in the unit found appropriate herein and the complaint contained the unit description found appropriate herein, Respondent would have continued to (1) deny the appropriateness of the unit and (2) assert that it had a good-faith doubt of the Union's majority. Thus, I find, as in *Kendall Memorial & Marine Workers*, supra, that the unit variation among the Union's demand unit, the General Counsel's complaint unit and the unit found appropriate herein did not cause Respondent to change its conduct. More particularly, I find that even if the Union had demanded recognition in the unit found appropriate herein and the General Counsel had alleged the same unit in the complaint, Respondent would have at all times material refused to recognize the Union based on the two contentions: (1) that the unit was inappropriate as not in conformity with the unit set forth in Respondent's RM petition and (2) that Respondent has a good-faith doubt respecting the Union's majority in the unit. Respondent's asserted ''unit variation'' defense therefore, even were it not to have been found to be without merit above, would be, for this independent reason, untenable.

In summary, I have found that the variations in both number of employees and unit inclusions between the Good Shepherd unit alleged as appropriate in the Union's demand letter, in the General Counsel's complaint, and in the unit found appropriate herein are inconsequential and not a defense to Respondent's obligation to recognize and bargain with the Union respecting the unit found appropriate herein. I have found that the General Counsel at the hearing took the position in colloquy with the judge and Respondent's counsel, as an alternative theory of a violation, that, in the event the unit alleged in the complaint was found to inappropriately include licensed practical nurses, Respondent should be ordered to recognize and bargain with the Union respecting the unit found appropriate. I found this to be a timely raising of the alternative theory of a violation under the complaint. Finally, I found that, in all events, the unit variations did not cause Respondent to fail and refuse to recognize and bargain with the Union and, had the variations not occurred and all unit references in the Union's demand letter and the General Counsel's complaint been to the very unit found appropriate herein, Respondent would still have refused to recognize and bargain with the Union respecting the unit employees.

Given all the above for the reasons noted and based on the record as a whole, I find that the variations in the units contained in the Union's demand letter and the General Counsel's complaint as compared to the unit found appropriate herein do not provide Respondent with a defense to the unfair labor practice allegations contained in the complaint.

6. Conclusions respecting successorship and its consequences

In summary of my findings above, I have found that between the Board certified collective-bargaining unit of the Good Shepherd extant through August 30, 1994, and the Center unit found appropriate herein on and after August 31 through on or about the first half of September 1994:

(1) There was continuity of the employing industry.

(2) There was continuity of the bargaining unit.

(3) There was continuity of the work force, i.e., a majority of the new employer's unit members were from the old employer's unit.

(4) There was a timely and appropriate Union demand for recognition.

(5) There were no other procedural or substantive impediments to a finding of successorship.

Having made these findings I further find and conclude that Respondent was a successor to the Center and, as a result of that successorship and the timely union demand for recognition, the Union enjoyed a rebuttal presumption of majority support in the unit found appropriate herein.[20]

[20] The presumption is not limited to a presumption that the former employees of the predecessor support the union, rather, in essence, there are dual presumptions: (1) that a majority of the former employees of the predecessor support the Union and (2) that a majority of the other employees not from the former unit support the Union. *Jose Costa Trucking*, 631 F.2d 604 (9th Cir. 1980), enfg. 238 NLRB 1516 (1978).

7. Respondent's good-faith doubt defense

a. *Good-faith doubt in a successor context*

A successor employer is faced with a rebuttable presumption that the union represents a majority of employees in the unit. To avoid an obligation under the Act to recognize and bargain with the union, the employer must demonstrate either that the union does not in fact have the support of a majority—a contention not truly in issue herein—or, in the alternative, demonstrate by objective evidence that it had a good-faith doubt of the union's continuing majority. The Board in *Harley-Davidson Co*., 273 NLRB 1533 (1985), overruling previous inconsistent holdings, held that a successor employer who recognized a union and commenced bargaining with it could also end its obligation to bargain by a similar showing. Thus, after *Harley-Davidson*, supra, the successor employer who had recognized the union and thereafter withdrew recognition and the employer who had refused at all times to recognize the union could justify their conduct by showing actual loss of majority or making a traditional ''good faith doubt'' showing. The only limitation on such a demonstration was one of timing: an employer could not assert as a basis for its good-faith doubt of that majority acts or conduct that occurred after the employer withdrew or withheld recognition of the union.

b. *Respondent's assertions and arguments respecting good-faith doubt*

Respondent's arguments respecting its good-faith doubt in the instant case are sufficiently unusual that it is appropriate to quote its brief with respect to them:

> The good faith doubt asserted by the successor in the instant case is not of the kind which is typically asserted by and in this context. Here the alleged successor knew nothing of the bargaining history between the parties and knew nothing about the support or lack of the same, which the Union may have enjoyed between 1981 and 1994 when it was dealing with the [Good Shepherd] facility. Rather, the successor's good faith doubt is predicated upon the actual statements and conduct of the Union itself when it was confronted with the [Center's] acquisition of the [Good Shepherd] nursing home facility and its potential status as a successor. [R. Br. 27–28.]

Respondent identifies several circumstances which support the above argument. First, it notes that the union agents in closure and related negotiations with counsel for Good Shepherd in August told Good Shepherd counsel that it would seek to represent the new employer, i.e., the Center, in ''the old fashioned way—we will earn it'' and that the statement was soon reported to Respondent's agents.

Second, the Union in a memorandum to Good Shepherd employees dated August 29, 1994, after addressing concerns relevant to Good Shepherd stated:

> As we leave this very difficult transition period and embark upon another challenge—recognition and a new contract—with Northern Montana Care Center, it is doubly important that we continue to work together. If you have not already done so, please sign an ''Authorization for Representation'' card and return it to your Union. And, so that we may better analyze our position in future dealings with the Northern Montana Care Center, please complete the enclosed ''Post Closing Questionnaire'' and return it to your Union's office in the enclosed postage paid envelope.
>
> We have all enjoyed the fruits of all our labors in the past, but we must now continue in our effort to seek recognition and get a new labor Agreement.

Consistent with the memorandum, the Union solicited employees at work to sign standard initial organizing authorization cards and this fact was observed by and reported to Respondent's agents.

Third, Respondent notes the Union's demand letter was a typical initial organizing demand letter and ''conspicuously omitted any reference to successorship'' (R. Br. 25.)

Further, Respondent argues that the impact of the Supreme Court's decision in Health Care on the supervisory status of the Center's licensed practical nurses and the other changes in the Center's dietary and maintenance operations ''made the Union's card-based organizational effort a plausible strategy under the circumstances.''

Respondent's legal argument from these events starts with the uncontroverted position that consideration of a good-faith doubt defense must include a review of the ''totality of the circumstances,'' citing *Hawaii Carpenters Trust Funds v. Waiola Carpenter Shop*, 823 F.2d 289 (9th Cir. 1987). Counsel for Respondent further notes that the good-faith doubt, although necessarily based on objective facts, must be considered from the employer's perspective. Further, an assessment of the cumulative effect of the combination of factors is required. *Dalewood Rehabilitation Hospital v. NLRB*, 566 F.2d 77, 80 (9th Cir. 1977).

Respondent also calls attention to the Tenth Circuit Court of Appeal's decision in *NLRB v. Oil Capital Electric, Inc*., 5 F.3d 459 (1993), which, although containing other factors and aspects, found as supportive of an employer's assertions of good-faith doubt of the union's continuing majority, the fact that the union had attempted an organizing campaign which failed.

c. *The response of the General Counsel and the Charging Party*

The General Counsel and the Charging Party addressed each of Respondent's contentions. Respecting Union Agent Crane's purported statement to Good Shepherd's counsel that the Union was going to have to organize the Center the ''old fashioned way, they were going to have to earn it,'' they urge the statement must be taken in its context. Thus they argue that the statement occurred during a process of dual, two party negotiations between, first, Respondent and Good Shepherd respecting the terms of the acquisition agreement and, second and independently, Good Shepherd's negotiations with the Union respecting closure effects.

The General Counsel and the Charging Party adduced evidence which showed that Good Shepherd and the Center, as a result of specific conscious intent and design, took special and extensive precautions in their agreement to insure that no successorship obligation accrued to Respondent respecting Good Shepherd's collective-bargaining agreement with the

Union.[21] It was when Union Agent Crane was finally shown the language of the Good Shepherd—Center acquisition agreement that he made the remark attributed to him. Thus, the General Counsel and the Charging Party suggest that the remark simply meant that the Union recognized that it could not utilize the agreement entered into between Good Shepherd and the Center as an independent basis for continuity its representation of the unit and that it would have to deal directly with the Center, i.e., the old fashioned way. Thus, they argue that the remark was not related to the Union's actions respecting the Center, be they based on a successorship relationship under *Burns*, supra, or some other organizational action. Finally, they suggest that Respondent's agents were well aware of this distinction and, accordingly, the second hand report by Good Shepherd's counsel to Respondent's agents that the Union had told Good Shepherd it would be going directly to the Center the old fashioned way is not objective evidence tending to support doubts of anything relevant to the issues herein.

Meeting Respondent's arguments that its knowledge of the fact that the Union was distributing traditional authorization cards was objective evidence to Respondent that the Union itself doubted its successorship status and intended rather to organize employees by means of a card majority, the General Counsel and the Charging Party make essentially two arguments. The first is that the fact of the Union's card solicitation efforts in this context is not demonstrative of either the Union's doubts of the existence of a successorship or a belief that the Union lacked majority support among employees, but rather is evidence only of simple Union prudence that it would still be able to seek recognition in the event the new employer's hiring did not produce a majority of Good Shepherd employees in the new unit.[22] The second argument is that, in all events, the circumstance that the Union engaged in card solicitation under any analysis is of the most minimal consequence and of little worth in sustaining Respondent's asserted good-faith doubt.

d. *Analysis and conclusions respecting Respondent's assertion of good-faith doubt*

At the onset of the analysis it is appropriate to consider just what the doubts asserted by Respondent specifically concern. The bulk of the evidence offered by Respondent seem offered to support the proposition that Respondent had good-faith doubts about the coming into existence of a successorship relationship ab initio. Only a very small portion of Respondent's evidence was offered to suggest that, irrespective of successorship or no, certain of the employees of the Center indicated they did not support the Union.

Thus, there was some testimony that Respondent became aware that a relatively small number of employees indicated a lack of support for the Union. This is classic good-faith doubt evidence but is, as the General Counsel and the Charging Party argue, very far short of the mark in terms of numbers of employees involved to sustain the defense asserted. While it is clear that in asserting a good-faith doubt, Respondent need not establish hard numbers regarding loss of majority, it may not rely on evidence that only a few out of many in the unit expressed lack of support for the Union. Indeed Respondent does not specifically allude to or advance this evidence on brief in support of its good-faith defense. As noted, supra, I find that no showing or indeed argument on brief was made that the employees had in fact abandoned their support for the Union or that Respondent had objective evidence to sustain a good-faith doubt based on such evidence.

The heart of Respondent's argument is not that, after a successorship occurred, it formed a good-faith doubt that a majority of its unit employees supported the Union. Rather Respondent is asserting it had a good-faith doubt that a successorship obligation ever came into being. A doubt respecting majority employee support for a union is measured by evidence relevant to unit employee sentiments. Evidence relevant to an employer's doubts about the existence of a successorship is a far broader and legally different matter. For example, Respondent at page 35 of its brief asserts that there are 5 uncontroverted facts which support its assertion of a good-faith doubt. Facts 4 and 5 of the listed facts are, as number 4, the change in the law relevant to the supervisory status of licensed practical nurses and, as number 5, the fact that the Hospital employed the dietary and maintenance employees at the Center. These facts have no possible bearing on particular employee sentiments respecting the unit. Rather they are solely relevant to the question, the unit and whether or not a successorship relationship existed between Good Shepherd and the Center.

The first three enumerated facts in the list of five facts in Respondent's brief offered in support of its good-faith doubt are the three union actions asserted by Respondent as showing that the Union itself had doubts respecting successorship. Thus, the asserted facts are: (1) the Union's announcement to the predecessor it would take action ''the old fashioned way,'' (2) that the Union engaged in a card campaign, and (3) that the Union's demand letter contained no reference to successorship. All three are offered to support the proposition, not that the Union's organizational effort failed,[23] but that this evidence allowed Respondent to come to the good-faith belief that the Union itself doubted it was a successor or that its successor theory was valid. Respondent then argues the apparent doubt of the Union respecting successorship objectively supported its own good-faith doubt that a successorship relationship existed.

[21] Without going into significant detail respecting an area of law not relevant herein. The courts have addressed situations where predecessor employers as a result of contractual provisions respecting successorship have created arguable rights on behalf of the contracting union based on that contract. See, e.g., *Howard Johnson Co. v. Detroit Local Joint Board, Hotel & Restaurant Employees*, 417 U.S. 249 (1974); *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964). Successorship disavowal language in an acquisition agreement between predecessor and successor employers is irrelevant to the *Burns* type of successorship involved herein, and, without doubt, skilled labor counsel for both Good Shepherd and Respondent knew this was so.

[22] Union Agent Crane testified that the Union undertook the organizing campaign in July or August at a time it knew the changeover was coming but had not as yet occurred. He stated that the Union was simply preparing for contingencies, if the new entity hired a majority of Good Shepherd employees, successorship would be a basis for claiming recognition, if ''there weren't a majority by the new entity, then we were prepared to go the organizational route.''

[23] The General Counsel specifically disclaimed at the trial any contention that the Union's authorization cards were to be relied on in establishing the necessary union majority herein.

To the extent Respondent asserts doubts respecting successorship independent of union majority, I reject the arguments as a matter of law. Thus, I find the Board's traditional good-faith doubt defense extends only to the narrow issue of employee support. To the extent, Respondent suggests that successorship may be defended against by establishing a good-faith doubt about matters other than union majority support among employees, such a good-faith defense fails as a matter of law. For example, the Court in *Fall River Dyeing Corp*., supra, 482 U.S. at 44 fn. 16, noted that good-faith doubts respecting successorship as to the time a representative compliment of employees was employed might produce a good-faith recognition of a union that was premature or might cause an employer to improperly withhold recognition from a union. In each case the Court noted it assumed a ''good faith'' violation of the Act would be found by the Board.

I also find that Respondent's argument that an employer may rely on the Union's doubts respecting its majority are inapplicable when the issue is whether or not a successorship relationship came into existence. As the Board's analysis in *Hydrolines, Inc*., 305 NLRB 416 (1991), quoted from supra, and the *Fall River Dyeing* decision on which it heavily relies, indicates, in a successorship situation it is the employer who is in by far the better position to know if a successorship relationship has been created than the union.[24] Thus, as herein, the employer has a better knowledge of what the appropriate unit will be, the numbers of employees in the unit and which of those employees were from the former employer. The Union herein, on September 2, 1994, only 2 days after Respondent's August 31, 1994 commencement of operations, could only be uncertain respecting each of these critical elements. Given all the above, I find that Respondent could not assert as a defense to the allegations herein, in reliance on the Union's alleged doubt or otherwise, that it had any good-faith doubts about the successorship or the fact that a majority of its unit employees had been employed by Good Shepherd in the unit.

Given all the above, and having given serious consideration to the contentions of Respondent respecting its claims of good-faith doubt, I make several independent findings. First, I find Respondent has not established by objective evidence that it had a good-faith belief that the presumption of unit employee majority support for the Union arising from the successorship relationship, found supra, had been rebutted by employee actions or sentiments. Thus I find, as noted supra, and I do not believe Respondent seriously contended otherwise, that Respondent did not have a supportable good-faith doubt that the Union had lost its presumption of majority through subsequent employee expressions of dissatisfaction or lack of support for the Union.

I further find that Respondent on this record has not successfully asserted as a defense that it has a good-faith doubt that a successorship had occurred. As part of this finding, I find that Respondent may not assert that it had any doubts that a majority of its unit employees had been employed in the Good Shepherd or predecessor bargaining unit. Rather, I explicitly find that Respondent either well knew or should have known the identity of the employees in its unit and whether or not they had been employed in the predecessor unit in the immediately preceding period. I further find in this regard that Respondent may not as a matter of law assert as a defense to the failure to recognize and bargain allegations at issue herein that it has a good-faith doubt concerning any of the other aspects of a successorship relationship. Thus for all the reasons set forth above, I reject as legally insufficient any claims that Respondent has a good-faith doubt as to such nonmajority elements of successorship such as the date a representative compliment of employees was employed, the appropriateness of the successor unit, the number of employees in the unit or like and related arguments not sounding directly in a claim that Respondent, based on objective evidence, had a good-faith doubt that its unit employees supported the Union.[25]

In summary, I find that Respondent's good-faith doubt defense fails in part in its factual assertions and in part in its underlying legal theory and that, based on all the above and the record as a whole, Respondent's good-faith defense is without merit.

8. Summary and conclusions respecting Respondent's alleged obligation to recognize and bargain with the Union

Summarizing my findings and conclusions supra, I found that the Union had been certified by the Board as exclusive representative of and had long bargained concerning a unit of employees employed by the Lutheran Home of the Good Shepherd, Inc. at its facility in Havre, Montana, until its sale effective August 31, 1994. I further found that Respondent acquired and commenced operations of the former Good Shepherd facility without hiatus on August 31, 1994.

I have found that Respondent in its operation of the facility is a successor to the Lutheran Home of the Good Shepherd, Inc. I found the following unit to be appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act and the successor bargaining unit:

> Employees of Northern Montana Health Care Hospital and Northern Montana Health Care Center regularly employed at the Northern Montana Health Care Center in the following job classifications: nurses aides, dietary aides, rehabilitation aides, maintenance, laundry, housekeepers, activity aides and ward clerk employees,

[24] In an initial organizing setting where an employee is held to support the union only when he or she overtly manifests such an intention and usually does so to the union and without the employer's knowledge, it is the union which is ''in the know'' and the employer which is likely ignorant of the extent of employee union support. In a successorship context the employee sentiments which are at issue are entirely represented in the fact of their immediately previous former employment in the represented unit. I find that no employer may reasonably assert that it did not know or reasonably could not have known which of the employees it has hired had been very recently employed by the predecessor employer. Thus in a normal successorship setting, free from highly unusual facts such as those presented in *Pick-Mt. Laurel Corp*., 239 NLRB 1257 (1979), enf. denied 625 F.2d 476 (3rd Cir. 1980), no reasonable doubt could exist on the part of the employer that a successorship relationship existed or that a majority of its unit employees came from the predecessor unit.

[25] This being so, to the extent Respondent has asserted such defenses, I make no findings respecting the sufficiency of the objective evidence offered to support such argued good-faith doubts. See, however, a related issue discussed in the remedy section, infra.

> excluding all professional employees, registered nurses, licensed practical nurses, administrators, activity supervisors, confidential employees, guards and supervisors as defined in the Act and all Hospital employees irregularly employed at the Center.

I have found that the single employer of the successor bargaining unit set forth immediately above includes the Center, the Hospital and Northern Montana Care, Inc.

I have further found that in early September 1994 the successor unit had a representative compliment of employees, a substantial majority of whom were from the predecessor unit of Good Shepherd. Given the finding of successorship and majority employee continuity between the union represented predecessor unit and the successor unit, I found that a presumption of majority support for the Union arose by operation of law.

During the early part of September 1994, the Union made upon Respondent a legally sufficient demand for recognition and bargaining in a unit not at consequential variance from the successor unit set found appropriate above. Respondent was unable to demonstrate that at relevant periods, in fact, a majority of Respondent's unit employees' no longer supported the Union. Nor was Respondent able to establish by objective evidence that it had a good-faith belief that the Union lacked majority support among unit employees. Accordingly, I further found that upon receipt of a legally sufficient demand for recognition in a unit not at consequential variance from the successor unit, Respondent was obligated to recognize and bargain with the Union respecting that unit.

Respondent having been obligated to recognize and bargain with the Union respecting its unit employees, and there being no doubt that all times material to date it has failed and refused to do so, I further find that the General Counsel has sustained the allegations of the complaint and that Respondent, by failing and refusing to recognize and bargain with the Union respecting unit employees since the receipt of the sufficient demand has violated Section 8(a)(5) and (1) of the Act.

REMEDY

Having found that Respondent has violated the Act as alleged, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes and policies of the Act.

I shall direct, as is usual in successor situations, Respondent to recognize and bargain with the Union and make unit employees whole for any losses they suffered as a result of Respondent's failure to recognize and bargain with the Union, with interest as calculated in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

I shall also direct Respondent, upon request by the Union, restore the status quo ante respecting terms and conditions of unit employees' employment. noted supra, a dispute exists respecting when Respondent was fairly appraised of the theory of the Union's demand. While I have found that the demand need not have given a legal theory in support, I am also mindful of the Supreme Court's suggestion in *NLRB v. Fall River Dyeing Corp*., 482 U.S. 27 fn. 19 at 53 (1987), that in certain successorship cases involving good-faith employer mistakes respecting other aspects of successorship, the Board might adjust its remedial order. Accordingly, for purposes of remedy only, I find that the bargaining obligation should be regarded as ripening on September 16, 1994, a time when there is no dispute that Respondent was fully apprised of the Union's successorship theory. Thus, the ''ante'' date herein is September 16, 1994.

In view of the total rejection of the Union explicit in Respondent's violation of the Act, I shall also include a broad cease-and-desist order. See *Hickmont Foods*, 242 NLRB 1357 (1979).

In light of my single employer finding, supra, Northern Montana Health Care, Inc. and Northern Montana Hospital shall be jointly and severally liable with Northern Montana Center for carrying out the terms of this order.

On the basis of the above findings of fact and the record as a whole, I make the following

CONCLUSIONS OF LAW

1. The Center is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union was certified as the representative of and had a long period of bargaining respecting a unit of employees employed by the Lutheran Home of the Good Shepherd at its Havre, Montana facility until its sale effective August 31, 1994.

4. Respondent is a successor to the Good Shepherd in the unit set forth below operating the facility at all times on and after August 31, 1994.

5. Respondent, the Northern Montana Health Care, Inc. and the Northern Montana Hospital are a single employer employing the unit set forth below.

6. The following unit is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act and is the successor bargaining unit to the Good Shepherd unit noted above:

> All employees of Northern Montana Health Care Hospital and Northern Montana Health Care Center regularly employed at the Northern Montana Health Care Center in the following job classifications: nurses aides, dietary aides, rehabilitation aides, maintenance, laundry, housekeepers, activity aides and ward clerk employees, excluding all professional employees, registered nurses, licensed practical nurses, administrators, activity supervisors, confidential employees, guards and supervisors as defined in the Act and all Hospital employees irregularly employed at the Center.

7. The Union demanded recognition of Respondent on September 2, 1994, as the representative of unit employees.

8. As a result of the successorship the Union enjoyed a rebuttable presumption of majority employees support amongst bargaining unit employees.

9. Respondent did not have a good-faith doubt that a majority of unit employees supported the Union at relevant times.

10. Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing at all times since September 2, 1992, to recognize and bargain with the Union respecting the unit set forth above.

11. The above unfair labor practice constitutes an unfair labor practices effecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]